JAIKISHNAN REWACHAND

v.

ENDLESS REALTY SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[CIVIL APPEAL NO: R2-11-190-2000]
5 FEBRUARY 2003

CIVIL PROCEDURE: *Action - Withdrawal with liberty - Amendment to order to limit place of refiling - Refiling of same matter by way of originating summons - Functus officio - Whether applicable - Abuse of court process - Subordinate Courts Act 1948, s. 65(3)*

CIVIL PROCEDURE: *Appeal - Decision of trial judge - Preliminary objection - Discretion exercised by trial judge - Whether rightfully exercised - Jurisdiction of court to hear matter - Rules of the High Court 1980, O. 33*

The plaintiff upon agreement with the defendant obtained a certificate pursuant to s. 65(3) of the Subordinate Courts Act 1948 and thereafter on the 20 October 1999 withdrew the action in the Magistrate's Court with liberty to file afresh ("said withdrawal order"). The plaintiff then filed a similar action against the defendant in the High Court by way of Originating Summons ("OS"). The defendant by way of application dated 10 January 2000 applied for an amendment of the said withdrawal order to reflect that the refiling of the matter could only take place in the Magistrate's Court which said application was dismissed by the learned judge on the 3 October 2000 ("said decision"). The defendant is now appealing against the said decision. On 14 June 2001, the court allowed the defendant's application to adduce fresh evidence in the nature of the grounds of judgment of YA Hakim Dato' Nik Hashim bin Nik Abd Rahman ("said judgment") and the order of the learned judge dated the 31 January 2001 which was an order pursuant to O. 33 Rules of the High Court 1980 to determine the preliminary issue as to whether this court had the jurisdiction to adjudicate the plaintiff's OS in view of the said withdrawal order ("decision on PO"). The learned judge held that the High Court had no jurisdiction to adjudicate the plaintiff's action. There are two issues before this court today. Firstly, whether the doctrine of *functus officio* raised by the plaintiff applied to the facts of the case and secondly whether an appeal lays towards a preliminary objection ("PO").

Held (allowing the defendant's appeal with costs and a consequential order to amend the said withdrawal order):

[1] The doctrine of *functus officio* raised by the plaintiff does not apply to the facts of the case for two reasons. Firstly, because the Magistrate had not fully discharged her function in so far as the "manifest intention" of the said withdrawal order and secondly what was sought here was amending an order to reflect the court's intention when parties enter into a statutory agreement. Even if the doctrine of *functus officio* applies here, this concept will have to take a back seat in the event this court holds the view that the said withdrawal order has to be amended to reflect that the "plaintiff can only refile the action against the defendant in the Magistrate's Court" otherwise it will be a flagrant abuse of the court's process. (p. 298 f-h)

[2] A preliminary objection is appealable. It is clear that this is not an appeal against a PO and it is thus prudent for me to consider the whole application and make a decision based on its merits rather than a PO in the interests of justice. (p. 301 b-d & h)

[3] The principal matter which is the subject matter of the defendant's application is the application by the defendant to seek an order to amend the said withdrawal order to reflect that the liberty to file afresh is limited to the Magistrate's Court. Thus in dismissing the whole action, the "subject matter in dispute" has been disposed of. The Magistrate made the said decision before the said judgment came into existence which was pursuant to an O. 33 RHC 1980 application by the defendant on the OS filed by the plaintiff. Thus it is clear from the foregoing, that there are different issues discussed in both the applications compounded by the fact that since the plaintiff has appealed to the Court of Appeal against the said judgment, there is I think a live issue to be determined by this court which issue is the "right of the defendant to amend the said withdrawal order to reflect that the plaintiff withdrew the action with liberty to file afresh in the Magistrate's Court as soon as the plaintiff had abused the court's process by filing afresh in the High Court". (pp. 301 h, & 302 a-d)

Case(s) referred to:

Hartecon JV Sdn Bhd & Sons v. Hartela Contractors Ltd [1997] 2 CLJ 104 CA ***(refd)***

Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd [1999] 4 CLJ 533 CA ***(refd)***

Motor Emporium v. Arumugam [1993] MLJ 276 ***(refd)***

Pacific Centre Sdn Bhd v. United Engineers (M) Bhd [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319 HC ***(refd)***

Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor [2000] 1 CLJ 553 CA ***(refd)***

Legislation referred to:
Civil Procedure Code, s. 151
Courts of Judicature Act 1964, s. 29
Rules of the High Court 1980, O. 33, O. 92 r. 4
Subordinate Courts Act 1948, s. 65(3)
Subordinate Courts Rules 1980, O. 49 r. 6(3)

Civil Procedure Code [Ind], s. 151

For the appellant - Shaikh Saleem (Siti Noor Hazenah Shaul Hamid); M/s Anad & Noraini
For the respondent - M/s Lee Ling & Partners

Reported by Sharmini Pillai

JUDGMENT

Faiza Tamby Chik J:
This is an appeal by the defendant against the decision of the learned Magistrate delivered on 3 October 2000 wherein she dismissed the defendants application dated 10 January 2000. The defendant in his application is seeking, that the order dated 20 October 1999 obtained by the plaintiff be amended to reflect that the plaintiff be only allowed to refile the action only in the Magistrate's court. It is observed that the reason that necessitated the application was due to the fact that the plaintiff upon agreement with the defendant obtained a certificate pursuant to s. 65(3) of the Subordinate Courts Act 1948 (certificate is found at p. 47 of the Record of Appeal) and thereafter applied to withdraw the action with liberty to file afresh (order made on 20 October 1999 found at p. 49 of the Record of Appeal) and thereafter did file a similar action against the defendant but in the High Court at Kuala Lumpur *vide* Originating Summons S7-24-2459-1999 (the Originating Summons as well as the affidavit in support of the originating summons is found from pp. 37 to 45 of the Record of Appeal). The defendant's counter-claim is still pending and yet to be disposed of.

I think it will be an abuse of process if the plaintiff refiles the same cause of action in a higher court with the hope to get more monies from the defendant. The certificate obtained by the plaintiff and the defendant binds the parties as if it was a statutory agreement and there is much force in upholding such statutory agreement rather than brushing aside its importance. It is noted that on 14 June 2001 the court allowed the defendant's application to adduce fresh evidence in the nature of grounds of judgment by YA Hakim Dato' Nik Hashim bin Nik Abd Rahman and the order of the learned judge dated 31 January 2001. This pertains to the Kuala Lumpur High Court Suit S7-24-2459-1999 which is the same suit filed by the plaintiff against the defendant,

after withdrawing the Magistrate's court suit with liberty to file afresh. The order dated 31 January 2001 (p. 1-2 of the Supplementary Record of Appeal) sprung from an application by the defendant pursuant to O. 33 Rules of the High Court 1980 to determine a preliminary issue which is whether this court has the jurisdiction to adjudicate the plaintiff's Originating Summons considering that the plaintiff have previously file a similar action in the Magistrate's court *vide* Summons No. 72-672-1995, and the plaintiff and the defendant had agreed and secured a certificate under s. 65(3) of the Subordinate Courts Act 1948 which gives the Magistrate's court the power to hear the plaintiff's claim as well as the defendant's counter-claim even though the claims of both parties exceed RM25,000. Justice Dato' Nik Hashim's order on 31 January 2001 was after the order of the Magistrate court on 3 October 2000, hence the learned Magistrate may have come to a different decision if she had the benefit of Justice Dato' Nik Hashim's reasoned judgment (which is found from pp. 3 to 12 of the Supplementary Record of Appeal). The learned judge in conclusion had advised the plaintiff to comply with the certificate they had signed and that the High Court has no jurisdiction to adjudicate the plaintiff's action.

The defendant is an individual and if the true intention of the plaintiff in withdrawing the Magistrate's court action with liberty to file afresh, was known to the defendant and/or his solicitor on the date of 20 October 1999 (when the plaintiff withdrew the action), he would not have consented to the action being refiled in a higher court. In the light of the said order dated 31 January 2001, the only fair and reasonable order that this court can hand out would be to reflect the Magistrate's court 'manifest intention' when it made the 20 October 1999 order which is "the action be struck out with liberty to refile the action only in the Magistrate court". I think the doctrine of *functus officio* raised by the plaintiff does not apply to the facts of the case as the Magistrate did not fully discharge her function in so far as the 'manifest intention' of the order dated 20 October 1999 and what is sought here is amending an order to reflect the court's intention when parties enter into a statutory agreement. If not, there is no purpose or meaning for the legislature to create protection for litigants who come to court to seek justice. Even if the doctrine of *functus officio* applies here this concept will have to take a back seat in the event this court holds the view that the order dated 20 October 1999 has to be amended to reflect that the plaintiff can only refile the action against the defendant in the Magistrate court otherwise it will be a flagrant abuse of the court's process.

In *Jasa Keramat Sdn. Bhd. & Anor v. Monatech (M) Sdn. Bhd.* [1999] 4 CLJ 533 CA, the Court of Appeal held:

> Held: (1) The circumstances in which the court's process may be abused are varied and numerous and the categories of such cases are therefore

not closed. Whether the institution of an action or its continuation or a step taken therein amounts to an abuse of process, depends upon particular and individual circumstances. Where an action is found to be an abuse of the court's process, it may be struck out or stayed. If it is too late to do this, the party aggrieved may bring an action based upon the tort of abuse of process (see pp. 6451 - 646A)

(2) Abuse of process in the context of a step taken in the proceedings would include the use of interlocutory relief as an instrument of oppression. It is plainly an abuse of the court's process where the relief at law or in equity is used, not to remedy a genuine grievance, but as an instrument of oppression. In such cases, the courts have always intervened and set the matter right (see 647A-C).

(3) On the facts the respondent plainly abused the process of court not only in instituting the third action but in the steps it took therein.

In *Tenaga Nasional Bhd. v. Prorak Sdn. Bhd. & Anor* [2000] 1 CLJ 553, the Court of Appeal stated:

> There are of course, cases which demonstrate that the power to recall orders after they are made is not untrammelled. See example *Chua Wah Keow v. Ng Ho Huat & Anor* [1961] MLJ 321. We may add that we have derived much assistance upon this aspect of the case from the admirable judgment of Zulkefli J, in *Chua Weng Meng v. Wong Kok Kong* [1992] 2 MLJ 416 where he has collected and carefully analysed all the relevant authorities upon the subject. The governing principle appears to be 'that having regard to the extensive rights of appeal now conferred on parties, the power to recall an order which has not been passed and entered is one which should be sparingly exercised'. (*Chua Weng Meng v. Wong Kok Kong* at p. 422). In our judgment the limitations upon the exercise of the power in a court to recall a judgment or order that has not been perfected are of no relevance to the facts that lay before the judge at the relevant point in time. That is because the default judgment entered by the judge was defective and therefore irregular. It was irregular because it has been entered in breach of the express understanding reached between counsel and sanctioned by the court that only the issue of liability was to be tried. The assessment of quantum was postponed. It is plain that this agreement was overlooked all round when the court entered judgement.

(It is emphasized that the plaintiff and the defendant have entered into a statutory agreement when they secured the certificate pursuant to s. 65(3) Subordinate Courts 1948 and hence cannot resile from the said statutory agreement).

> The default judgment being irregular, it was liable to be set aside *ex debito justitae* without reference to merits. We take the principle to be well settled and beyond controversy. But, if authority is required in its support, it may be found in the judgment of Edgar Joseph Jr. FCJ, in *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd.* [1996] 1 MLJ 30 at p. 36:

> It is elementary that an irregular judgment is on which has been entered otherwise than in strict compliance with the rules or some statute or is entered as a result of some impropriety which is considered to be so serious as to render the proceedings a nullity.
>
> The general rule is that when it is clearly demonstrated to the satisfaction of the court that a judgment has not been regularly obtained, the defendant is entitled to have it set aside ex *debito justitae*, that is to say, irrespective of the merits and without terms. Having said that, it should be added that the application to set aside such a judgment should be made: (a) with reasonable promptitude, in other words within a reasonable time; and (b) before the defendant has taken any fresh step after becoming aware of the irregularity (see O. 2 r. 2(1) of the Rules of the High Court).

Accordingly, this was a case where the judge could have acted under RHC O. 92 r. 4 which reads:

> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

The rule has been held to have jurisdictional effect. See *Pacific Centre Sdn. Bhd. v. United Engineers (M) Bhd.* [1984] 2 MLJ 143. Its origin may be traced to s. 151 of the Civil Procedure Code (Cap 7) of Malaya, which in turn was *ipsissima verba* s. 151 of the Indian Civil Procedure Code. The latter sections provided as follows:

> Nothing in this code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

Order 92 r. 4 is declaratory of the inherent jurisdiction of a High Court. The nature and scope of that jurisdiction was explained by Terell Ag CJ in the *Motor Emporium v. Arumugam* [1993] MLJ 276 at p. 278. According to the learned acting Chief Justice, a court:

> [H]as the widest possible jurisdiction in all suits, matters and questions of a civil nature, and although the legislature has given no indication on what principles such jurisdiction should be exercised, every court must have inherent jurisdiction to do justice between the parties, and apply such principles as are necessary or desirable for attaining such object, and for giving decisions which are in conformity with the requirements of the social conditions of the community where the law is administered.

Going by these two cases themselves, the doctrine of *functus officio* does not apply to the facts of this case because it is not setting aside the order dated 22 October 1999 but seeking justice to be meted out in the form of the amendment sought which will reflect the court's manifest intention which is the plaintiff should refile in the Magistrate's court.

It is true that the plaintiff raised a preliminary objection before the Magistrate's court but that is not the issue before me when considering the appeal. This is simply because the ultimate decision that triggered this appeal before this court was the decision to dismiss the defendant's application with costs (p. 53 of the Record of Appeal). (Notice of Appeal - p. 54 Record of Appeal). I think it is clear this is not an appeal against the preliminary objections as submitted by the plaintiff. Furthermore, all civil appeals from a Subordinate Courts shall be by way of rehearing. Section 29 of the Courts of Judicature Act 1964 provides: "all Civil Appeal from a Subordinate Court shall be by way of a rehearing and the High Court shall have the like powers and jurisdiction on the hearing of appeals from the High Court." It is thus prudent for me to consider the whole application and make a decision based on its merits rather than preliminary objections in the interest of justice. It is observed that the defendant did not include the plaintiff's notice in writing dated 19 July 2002 pertaining to the plaintiffs preliminary objections because O. 49 r. 6(3) of the Subordinate Courts Rules 1980 requires the defendant to file only:

(a) the application for the decision (at p. 14 of Record of Appeal);

(b) all pleadings filed;

(c) all affidavits filed in support of or in opposition to the application;

(d) the order or draft order of the decision appealed from.

In *Hartecon JV Sdn. Bhd. & Sons v. Hartela Contractors Ltd.* [1997] 2 CLJ 104 CA, the court stated:

> Once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be reopened. Although the first decision was made on an interlocutory matter which was purely procedural in nature, it was nevertheless binding on the court and on all parties to the lis until its reversal on appeal

Thus I am of the view that a preliminary objection is appealable. What is crucial here to note is that the order made by the Magistrate on 3 October 2000 has disposed of the principal matter in dispute thereby bringing a conclusion to the whole of the proceedings. The principal matter which is the subject matter of the defendant's application (p. 14 of the Record of Appeal) is the application by the defendant to seek an order to amend the order dated 20 October 1999

to reflect that the plaintiff withdraw the action with liberty to file afresh in the Magistrate court. Thus, in dismissing the whole application, the 'subject matter in dispute' (ie, requiring an order that the plaintiff do withdraw the action with liberty to file afresh in the Magistrate court) has been disposed.

The only recourse left for the defendant is to appeal against the Magistrate's order.

The appeal before this court is against an order dismissing the defendant's application to amend an order to reflect the plaintiff withdrawing the action with liberty to file afresh in the Magistrate court. The magistrate made the order on 3 October 2000 before Justice Dato' Nik Hashim made his ruling. It is also pertinent to note that the plaintiff had not deemed it fit to stay the ruling by Justice Dato' Nik Hashim then. What is also pertinent to observe is that the ruling made by Justice Dato' Nik Hashim was pursuant to an O. 33 Rules of the High Court 1980 application by the defendant on an originating summons filed by the plaintiff. Thus it is clear from the foregoing, that there are different issues discussed in both the applications compounded by the fact that since the plaintiff herein has appealed to the Court of Appeal against the ruling by Justice Dato' Nik Hashim, there is I think, a live issue to be determined by this court which issue is the 'right for the defendant to amend the order dated 20 October 1999 to reflect that the plaintiff withdraw the action with liberty to file afresh in the Magistrate court as soon as the plaintiff had abused the court's process by filing afresh in the High Court. It is also noted that the Notice of Appeal before this court was filed on 14 October 2000 and the Record of Appeal was filed on 25 October 2000. On 14 June 2000, this court also ordered by way of a consent order that the defendant be allowed to adduce fresh evidence which is now incorporated in the Supplementary Record of Appeal filed on 29 Ocotber 2001.

For these reasons the appeal is allowed with costs. A consequential order that the Magistrate court order dated 20 Ocotber 1999 be amended as follows (the underlining being the amendment sought):

Perintah

> ATAS PERMOHONAN PLAINTIF dan SETELAH MEMBACA Notis Menarik Balik yang bertarikh 8.7.1999 DAN SETELAH MENDENGAR Cik M.S. Wong yang menyebut bagi pihak peguamcara Plaintif dan Cik Sumitha, peguamcara bagi pihak Defendan, MAKA ADALAH PADA HARI INI DIPERINTAHKAN BAHAWA tindakan ini dibatalkan dengan kebenaran **untuk memfailkan semula hanya di Mahkamah Majistret** dan kos kepada Defendan.